(R. 65) or 44.75 per cent of $44,368 (R. 64), the latter figure being what the value of a mile of line would be if we were to divide the admitted system value by the number of miles. And if we relate cost of a mile of road in Wyoming to cost of an average system mile as heretofore shown, and leave out of consideration the fact that it produces less than an average system mile, even then we find that a mile of Wyoming line has a cost appraisal value of only 52.77 per cent of that of a system mile (R. 73). 52.77 per cent of $44,368 per mile is $23,413 per mile. The assessment as made was $28,313 per mile (R. 111). Both the trial court and the Circuit Court of Appeals recognized the fallacy of the figures as averaged by the board. Even the dissenting judge in the court below, who disagreed with his brethren of the majority on the proposition of jurisdiction, granted that "the method of valuation adopted was illegal and should be condemned" (R. 163).

If, in view of the vast differences which the evidence shows and the court has found exist between a mile of line in Wyoming and a system mile of respondent's railroad, it is arbitrary action to use the mileage factor alone, how is the vice removed merely by putting the bad factor in with three good ones? An omelet made of one bad egg would be a bad omelet. It would still be a bad omelet if made of three good eggs and one bad egg. What both lower courts did was to require an omelet made only of the three good eggs, with the bad one thrown out. If the present decision is allowed to stand, this court, in effect, will have approved the principle that the omelet must not be made of the bad egg alone but will be regarded as good if the bad egg is mixed with good ones.

II.

OPINION RECITES RELATION OF UNLIKE THINGS TO SUPPORT BOARD'S VALUATION.

On page 4 of the print of its opinion in this case, this court recites (with apparent approval—pages 6 and 7) the action of the board in relating Wyoming *cost* figures to system *value* (an average of stocks and bonds and capitalized income), and arrives at a percentage of 2.21. It is respectfully submitted that this is a comparison of unlike things. Cost of reproduction less depreciation in Wyoming should be related to cost of reproduction less depreciation for the system and that percentage used and applied to the agreed system value, if any percentage of that character is to be used. That percentage would be approximately 1.75, as the Interstate Commerce Commission appraisal for Wyoming, plus additions, less retirements, is 1.75 per cent of the same appraisal for the system, brought down to the date of the assessment complained of and in the same way (R. 73). Again it will be noted that the percentage 1.75 is within the neighborhood of the accepted factors.

It is respectfully submitted that the court has fallen into exactly the error that the board first did, in having related *cost figures in Wyoming* to system value figures *which are not cost figures at all*, and should not be. If an allocating percentage based on cost is to be used, it should be related to a system figure of like character. On such a basis, as already shown, the percentage would be 1.75,—not 2.21 as the board's calculation recited in this court's opinion would be. With this correction the percentage would more nearly support respondent's contention than that of petitioners.

Furthermore, these relations and comparisons were not

used by the board. They were "considered," according to the board, but evidently discarded, because the tabulation in the order shows the things that were actually used, and includes none of them.

III.

REPRODUCTION LESS DEPRECIATION WAS NOT ACTUALLY USED BY THE BOARD AND SHOULD NOT HAVE BEEN USED.

The board "considered" a number of things but it *actually used* only system value based on a composite of market value of stocks and bonds (less value of non-operating property) and capitalized net railway operating income, and Wyoming value allocated on the basis of traffic units, use of rolling stock, average of gross and net income, and miles of road. Its order so shows (R. 51). Things considered and ultimately discarded in fixing the valuation are not in the case.

In a tax case the ultimate idea is to fix the money equivalent of the property. It is not a question of theoretical values upon which the Railway Company is supposed to have the right to earn, but in fact never does earn, a fair return. It is a question of the actual money worth of the property, not in the light of what the maximum may be that the courts will permit it to earn if it can, but what its earnings actually are under efficient management. Reproduction less depreciation and an Interstate Commerce Commission appraisal made for this respondent in 1917 do not reflect at all the subsequent development of truck competition as we now know it,—the greatest menace to the continued existence of the present financial structures of the railroads of America that they have yet encountered. When the state sets up, at public expense, a system of modern, high-speed highways, competing with the rail transportation plants, for freight and passenger business within the state, no one

questions the right of the state to follow such a course. But when it does so, there certainly is nothing just or right about treating the plants of the railroads for tax purposes as if those parallel and competing publicly owned highways of transportation did not exist. Yet that is exactly what the state does if it uses reproduction less depreciation or I. C. C. value to build up a tax value. We are not speaking now of mere use of an allocating factor made up of the percentage that reproduction less depreciation in a given state bears to reproduction less depreciation for the system, or the percentage that the I. C. C. appraisal brought down to date in a given state bears to I. C. C. appraisal for the system brought down to the same date. We are speaking of the practice of taking the I. C. C. appraisal for the state or some other cost figure and finding the percentage that such a figure bears to a system value *made up without reference to cost or I. C. C. value and which nobody connected with this lawsuit has ever claimed should be made with reference to cost or I. C. C. value.* Fixing system value of a railroad operating in a number of states and then allocating to the respective states the portions of the whole value which should properly be treated as in the respective states, is a method approved in a number of cases cited to this court at pages 71 to 76 of our brief and is too well known to require further citation of authority, particularly as initially that is the way the board proceeded in the case at bar. If reproduction less depreciation or I. C. C. value were ever to have any place in fixing tax value of the railroad plant, naturally its place would come in fixing system value. This is so because the first part of the problem is to fix the value of the whole plant, and if reproduction less depreciation or I. C. C. value belongs in any state as part of the valuation process, it belongs in all states. But in this case it is agreed that the system value is $375,285,902, and it is likewise agreed that this system value is made up

on an average of market value of its stocks and bonds (less non-operating property locally taxed) and capitalized net railway operating income. It is clear beyond argument that neither reproduction less depreciation nor I. C. C. value had any place in the arrival at this agreed system value. The remaining part of the problem, then, is to find out what percentage of that system value belongs in Wyoming, and that part of the problem is to be solved by a relation or comparison of like things and thus secure the ultimate allocating figure to be used. What proportion does Wyoming property bear to the whole property? What proportion of the whole transportation plant does the use in Wyoming bear to the whole use? What percentage do Wyoming revenues bear to total revenues? All these things might, with propriety, be considered; because, having arrived at an agreed system value, the remaining problem is merely one of proportion. But to take reproduction less depreciation in Wyoming, after having eliminated it in arriving at system value, brings into the case at an entirely wrong place something previously ruled out, where, if ever, it would have had any place at all. We do not wish by this statement to leave the inference that it would be proper to use reproduction less depreciation or I. C. C. value to build up system value, in view of the problem being one of ascertaining the cash equivalent of the property. We merely say that whatever may be the arguments for or against using it in building up system value, the fact is that it was not so used at all in the present case, and that being so, there certainly is no adequate reason for bringing it in to build up the Wyoming portion of that system value except as the one thing may bear a percentage proportion to another *like* thing.

Since the board did not actually use reproduction less depreciation, but showed the exact mathematical formula which it did use, respondent felt justified in not arguing in

brief or at the bar the question of the propriety of using as part of the tax base calculations considered but not used, and, as we see it, discarded. It is earnestly submitted that having in mind what truck competition and other factors have done and are doing to destroy the original value of the railroad plant, no such far-reaching precedent approving the use of reproduction less depreciation in tax cases under present conditions should be adopted without full and complete argument of that very thing.

IV.

TRIAL COURT'S ACTION IN FIXING MAXIMUM ASSESSMENT WAS NECESSARY INCIDENT TO REQUIRING COMPLAINING TAXPAYER TO DO EQUITY, AND DOES NOT CONSTITUTE EXERCISE OF ADMINISTRATIVE FUNCTIONS.

The final paragraph of this court's opinion, unnecessary to the decision if it be true that respondent was not entitled to an injunction, overturns what has been the practice in the lower Federal Courts for many years in overassessment cases resting on constructive fraud or arbitrary overassessment.

The decision in *State Railroad Tax Cases*, 92 U. S. 575, did two things material to this point: (1) it laid down the principle that a court of equity will not interfere with an assessment which is merely erroneous (as distinguished from one which is arbitrary or fraudulent), and as one of the reasons for declining to interfere, pointed out that the court cannot perform the function of making the assessment which should be substituted for the one held erroneous, and (2) following the maxim "he who seeks equity must do equity," it prescribed the requirement that taxpayers who seek to enjoin assessments as fraudulent or arbitrary "must first pay what is conceded to be due, or what

can be seen to be due on the face of the bill or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted." The first of these two things, being stated as a reason why courts of equity cannot and do not interfere with mere errors of judgment of assessing bodies, has never been supposed to interfere with the power of a court of equity to do complete justice *in a case of fraud or arbitrary overassessment,* by enjoining that which clearly results from the fraud, and requiring payment of that which is due on the highest amount which can be assessed on any reasonable view of the evidence. Obedient to the direction given in the second of the above two things set forth in *State Railroad Tax Cases,* the lower Federal Courts for many years have been requiring payment of a portion of the taxes before granting a preliminary injunction in a case involving allegations of fraud or arbitrary overassessment. The complaining taxpayer is not always allowed to fix his own proportion to be paid, nor should he be. Preliminarily, if the amount tendered by the taxpayer as confessedly due seems to the court to be inadequate in any view, the court can fix, on affidavits or otherwise, the amount to be paid. Subsequently, the trial may develop, as in *Northern Pacific Railway Co.* v. *Adams County,* 1 Fed. Sup. 163, and *Mobile & Ohio Railroad Co.* v. *Schnipper,* 31 Fed. (2d) 587, that the board's assessment was too high on any view of the evidence, but that the payment made at the inception of the litigation was too low. Clearly the doing of equity then requires payment of the additional tax due and an injunction against the fraudulent or arbitrary excess. Any other procedure in a case of fraud, constructive or actual, or arbitrary overassessment, which is all we are talking about, would send the matter back to the offending board to make another assessment if it still has power to do so after the lapse of time during litigation, or to await the granting of power by the next legisla-

ture if by that time the board lacks the power or has become *functus officio,* as in *Northern Pacific Ry. Co.* v. *Adams County, supra.* Then future litigation on the new assessment is not at all unlikely, because a board which acts arbitrarily or is guilty of actual or constructive fraud, requiring the interference of a court of equity, is likely to make a new assessment still tainted with the same vices in a different form. The result would be endless litigation, and the holding up of the collection of needed public revenues or prevention of a timely determination as to just what amount can be depended upon from the source in question as its contribution to the public treasury.

The greater efficiency of an adjudication by which payment of the tax lawfully due is required and the excess is enjoined, is shown by several railway tax equalization cases, where this court has approved the practice by which the lower courts find the rate at which other property is assessed and require that complainant's property be not assessed at a greater percentage of true value. An injunction to restrain the discriminatory excess has long been the approved remedy, without sending the matter back to the board of equalization to do the fact finding. Such cases, for example, are *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, where this court sustained equity jurisdiction of the Federal Court in a street railway tax case and at page 38, approved the action of the Circuit Court in having required the taxpayer to pay the amount "which the court found to be a fair and just amount due from the appellee" (taxpayer), and affirmed a judgment enjoining the excess; and *Louisville & Nashville Railroad Co.* v. *Greene,* 244 U. S. 522, where this court remanded a tax valuation controversy to the United States District Court to redetermine the valid portion of a tax, because this court found that the trial court had adopted a valuation fixed

on an erroneous principle by the state board, whereas, the evidence indicated that a lower valuation should have been fixed by the court. While the *Greene* case also involved equalization, it was more than an equalization case. At page 554 of the opinion, it is clear that, far from requiring the lower court to send back the case to the state board for it to make a new valuation, this court *ordered the trial court itself to make the proper valuation and either to open up the proofs, in its discretion, or proceed to base its judgment upon such proofs as already were in the record.* The procedure thus approved by this court in the *Greene* case and followed by many lower Federal courts is not inconsistent with what was said in *State Railroad Tax Cases, supra,* when it is realized that in that case this court was pointing out *what it could not do in a mere case of errors requiring a reassessment.* The court was not speaking of constructive fraud or arbitrary overassessment when it made the pronouncement in question in *State Railroad Tax Cases, supra.* Therefore, we submit, the case does not support the broad statement now made by this court in the last paragraph of its opinion in the case at bar.

The other cases cited by this court in the final paragraph of its opinion likewise are not in point. *Thompson* v. *Allen County,* 115 U. S. 550, was a case in which a bondholder who had obtained a judgment against the county on some coupons asked the Federal Court to take over bodily the tax levying and collecting functions of the county long enough to compel a number of named taxpayers to respond to plaintiff's demand. Previously, by court assistance, the plaintiff had secured a judgment, had levied execution which was returned unsatisfied, and had procured through mandamus a levy to pay his judgment. He asked the court to appoint a receiver for the county, to

collect the taxes and turn them over to him. This court held that the Federal Courts could not grant the relief requested, as to do so would amount to taking over the legislative and executive branches of the county government to the extent indicated. This case is a long way from a mere injunction against that part of a tax produced by fraud, separable from the part validly owing.

Central Kentucky Co. v. *Commission,* 290 U. S. 264, was a rate case, wherein a district court had denied relief to the utility because of its refusal to assent to a rate fixed by the court. This court held such a condition an improper exercise of the power of the court and at page 272 of the opinion said:

> "Such a condition, too, is different from the requirement that a plaintiff shall pay a tax, the amount of which is known and conceded to be due, as a condition of enjoining an excessive tax."

Norwood v. *Baker,* 172 U. S. 269, was a special assessment case, not a tax case, and at pages 292 and 293 this court quotes with approval from a text-writer setting forth the distinction which exists between the obligation to pay the part of a tax which is legally due before seeking an injunction as to the remainder, and the situation in respect of a special assessment, where, as in the case then under discussion, the entire assessment was illegal and no part of the tax was payable until a valid assessment was made.

French v. *Barber Asphalt Paving Co.* 181 U. S. 324, was a case to enforce the lien of a special assessment, and this court affirmed a decree enforcing the lien. It does not concern the question at issue here, and only incidentally refers to *Norwood* v. *Baker,* and this in a way not inconsistent with the contention we are making here.

It is submitted that a re-examination of these cases and

a comparison with *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, and *Louisville & Nashville Railroad Co.* v. *Greene,* 244 U. S. 522, and especially with what was directed to be done in the *Greene* case at page 554, will disclose that the true distinction is (1) that in a tax case where the allegation is one of fraud (either actual or constructive) or arbitrary overassessment, or failure to give such equalization as constitutes equal protection of the laws, a court of equity may require payment of that which is due on the highest assessment that in any reasonable view of the evidence can be sustained, and restrain collection of the balance, without sending the case back to the offending board; (2) that in a tax case of mere error, a court of equity will not interfere because of its inability to exercise what is the legislative or administrative function; (3) that in a case involving a special assessment wholly illegal, the court will remand to the assessing authority the task of performing the legislative or administrative function involved. This case comes within the first of these classes.

If, as this court has said, respondent has no case, then such a serious thing as upsetting the existing practice should not be done when the question is not necessary to the decision, and therefore may not have had that mature and complete consideration which this court gives to questions that are essential to the decision. If respondent has no case for an injunction, that ends the litigation (except for correction of the admitted mathematical error to which reference will be made herein under heading V), and it is fruitless to say what the court should have done if respondent had had a case.

It is earnestly submitted, therefore, that if this court adheres to its view that respondent was not entitled to an injunction, the final paragraph of the opinion should be eliminated in any event and the question reserved for decision if and when it is necessarily presented.

V.

THE REVERSAL MAKES NO PROVISION FOR CORRECTION OF MATHEMATICAL ERROR CONCEDED BY THE BOARD.

As a footnote on page 5 of its opinion, this court says:

> "The court also corrected an admitted error of the board, by substituting 1.79% for 1.89%, average between gross and net operating revenues."

We assume that since all parties conceded this error, the form of the mandate, if there must be a reversal, should, in any event, allow for correction of this manifest and admitted error. The decision as it now stands renders it very doubtful whether the lower court can do even that. If this court is unimpressed with what has been presented in this petition, at least it should amend its direction for a straight reversal of the decree to such an extent as will not foreclose the respondent from having the court (or perhaps the board) correct an error which everyone admits occurred. If our computations are correct, this error of one-tenth of 1 per cent, corrected through the table which the board made up as set forth on page 4 of the decision, would reduce the valuation $84,438, as the ultimate percentage becomes 2.0775 instead of 2.10, or a difference of .0225 per cent. While such an amount is a very small crumb of satisfaction to a litigant which feels it has been arbitrarily overassessed by over a million and a half of dollars, respondent should not be foreclosed from a correction of a mathematical error which everyone seems to concede occurred (R. 36, 124, 127, 155). In such a situation, in *State Railroad Tax Cases,* 92 U. S. 575, at 618, the losing railroads were protected by the form of this court's reversal.

Conclusion and Prayer.

The court will recall that the major portions of the briefs and of the oral argument were taken up with serious questions of jurisdiction, which were thought to be the major consideration in the case. Those questions are left undecided by this opinion. The things upon which there was very little opportunity for oral argument, such as the propriety of using reproduction less depreciation or other cost figures under present conditions, and which the board did not actually use and which therefore were thought to be out of this case, are damaging things by way of precedent which ought not to be passed upon except deliberately and after full oral argument. The impropriety of relating Wyoming cost figures to system value figures having no relation to cost and then using the resulting percentage as an allocating factor, is something which, we believe, this court would not approve upon more complete consideration.

The final paragraph of the opinion, unnecessary to a decision if it be true that respondent was not entitled to an injunction, is especially disturbing by way of precedent, and, we believe, is a departure from recognized practice in this class of cases, built up in reliance on what is said in other decisions of this court.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

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Certificate of Counsel.

I, William T. Faricy, of counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

William T. Faricy,
Of Counsel for Respondent.